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No. 01 534

In The
Supreme Court of the United States

HUGH F. O'DONNELL
and
CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INCORPORATED,

Petitioners,

v.

JOHN EIDLEMAN, JOHN MCKAY
and
LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court below correct in holding- - contrary to the decisions of three other circuits - - that a legal services program receiving grants from the federal Legal Services Corporation for the delivery of services to low income persons may not challenge actions taken by the Legal Services Corporation which directly and significantly affect the program's funding and continued existence?

PARTIES

The parties are all shown in the caption. John McKay is no longer President of the Legal Services Corporation. Neither of the corporate parties is a publicly held Corporation, according to disclosures filed in the court below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. It is reprinted at App. 1. The bench opinion of the United States District Court for the Western District of Virginia, dated June 5, 2000 is also unreported and is reprinted at App. 5.

The decision of the United States Court of Appeals for the Fourth Circuit in *Regional Management Corp. v. Legal Services Corp,* 186 F.3d 457 (4th Cir. 1999) on which the court of appeals relied is reprinted for convenient reference at App. 12

JURISDICTION

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit was dated June 25, 2001. This court's certiorari jurisdiction arises under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

This matter involves federal laws establishing a system of financial support for the delivery of civil legal services to indigent persons especially the provisions of 42 U.S.C. 2996 a-l, establishing the Legal Services Corporation and the provisions of appropriations laws subsequently enacted which required LSC. to establish and implement a system of competitive grant - - making for the award of funds for the delivery of legal services to low income persons. See Pub. L. No. 104-134 (1996); Pub. L. No. 105-119 (1997); Pub. L. No. 105-277 (1998); Pub. L. No. 105-113 (1999).

STATEMENT OF THE CASE

Petitioner Client Centered Legal Services of Southwest Virginia (hereinafter CCLS) is a legal services program located in the coalfield region of far Southwest Virginia. Founded in 1979 by residents of the coalfields to serve the only area in Virginia without a publicly funded legal services program, CCLS received funding that year from the federal Legal Services Corporation pursuant to its established grant - - making procedures and in accordance with the LSC Act. In 1980, Petitioner O'Donnell became the first Executive Director of CCLS and remains its Executive Director.

Until 1996, there was no formal statutory or regulatory process governing the annual distribution of funding by LSC to local legal services programs. After obtaining an initial grant to provide services, a program like CCLS would in the normal course of things continue to receive annual grants to provide services as the exclusive provider in the service area for which it had originally qualified. To obtain annual funding from LSC, CCLS would submit an application for funding. Because Congress appropriates funds annually, the amount received each year by the program would depend on the amount appropriated to LSC by Congress.

In the history of legal services, because the original Act has never been re-authorized, appropriations laws have played a dual role. Besides determining annual funding for LSC and ultimately its grantees, the laws have also served as ways for Congress to regulate LSC and programs receiving funding from LSC. As Congressional perspectives about legal services changed, the appropriations laws would reflect those changes.

In 1996, Congress used the annual appropriations law for LSC to radically revamp the formal system of grant-making to local programs. See Public Law 104-134.

Instead of the exclusive "franchise" system which had been in effect since LSC's inception, Congress now mandated in Section 503(a)(1) "a system of competitive awards of grants and contracts for all basic field programs." Section 503(b) of the law required that LSC promulgate regulations to implement a "competitive selection process." Responding to this directive, the LSC Board promulgated a comprehensive regulation on *Competitive bidding for grants and contracts,* codified at 45 CFR Part 1634.

In October 1996, Corporation staff issued a policy statement on multi-year grants which called for a gradual staggering of grant terms. This policy was consistent with the LSC regulation on grant duration which provided that programs could get grants for as much as a five year term. See 45 CFR 1634.3(e).

In 1996, CCLS and other Virginia programs participated in the first round of grants under the new "competitive" regime. For this initial round, LSC defined three "service areas" for that part of Virginia southwest of Roanoke. One area so defined was the coalfield region which CCLS had served since 1980. The Request for Proposal - - in accordance with the policy statement on staggered terms - - stated that the grant term would be for one year.

That year, CCLS applied for a grant to serve the coalfield region and in December 1996 was awarded a grant to provide services for a one-year period. The size and duration of the grant it received were consistent with the original Request for Proposal and the program's expectations.

In the spring of 1997, LSC issued a new Request for Proposal for the grant period beginning in January 1998. For the second time, the coalfield region was identified as an appropriate "service area" for purposes of competition. The RFP stated that CCLS and other Virginia programs would

be eligible for three year grants. Again, CCLS submitted an application for the service area it had served since 1980. Again there was no competitor.

In December 1997, the customary time for announcing LSC grants, the new president of the Legal Services Corporation, John McKay, issued grant award letters for Virginia and other Virginia programs. McKay's letter referred to the fact that CCLS and other Virginia programs had been designated as eligible for three year grant terms.

Despite this designation, the letter announced that the grant would be for two years instead of for three years. Explaining LSC's decision to reduce the term of the grant, McKay stated as LSC's justification "because it is concerned that the number of programs may not constitute the most effective configuration for delivering services to the client community." The letter stated no legal authority for the action that was being taken.

The action taken in December 1997 was the opening salvo in an extended and continuing national campaign by LSC management to reduce the number of programs by manipulating grant terms and service areas to force local programs to merge. Although neither Congress nor the LSC Board had ever indicated that the purpose of the competitive bidding regime enacted in 1996 was to reduce the number of grant recipients, under McKay's leadership, consolidation of service areas became a central if unpublicized part of LSC strategy and a primary focus of management energy.

In February 1998, LSC management added a degree of legal formality to the consolidation agenda by enacting Program Letter 98-1, dealing with state planning. The LSC Board did not formally consider or approve its issuance, nor was it published in the Federal Register for comment before it was issued. Management felt that the program letter and a later one issued the same year dealing with the same issue "did not have to be published."

Program Letter 98-1 and later Program Letter 98-6 explicitly required that LSC grantees participate in statewide planning, and also required that LSC grantees serving local areas adopt a "statewide perspective." The issue of number of programs is discussed in Paragraph seven of the program letter: Configuration of A Comprehensive Integrated Statewide Delivery System. Explaining McKay's recent decision to make grants for a shorter period than that stated in the RFP, the Program Letter stated:

> The decision to award grants for a shorter period was made for two reasons: (1) to encourage recipients in these states to develop further plans for a comprehensive integrated statewide delivery system and (2) concern that the **number of programs** may not constitute the most economical and effective configuration for delivering services to the low income community.

(Emphasis supplied)

Program Letter 98-1 is devoid of any discussion of the relationship between program consolidation and the competitive regime formally established by Congress in 1996. It does however opine that "Each state must examine what configuration, *from a statewide perspective,* maximizes services and benefits for *clients throughout the state."*

As a result of the program letters, Virginia programs including CCLS renewed their attention to state planning. Meetings were held and task forces were formed to deal with a range of issues. In the spring of 1999, LSC issued a new RFP for the grant period beginning in January 2000. For this third round of competition since 1996, LSC again identified the coalfield region as an appropriate service area. As in the previous round, the RFP once again stated that grant recipients would be eligible for three year grants. The

second paragraph of Section VI of the RFP was entitled Selection Criteria. It stated that the Corporation "will evaluate each application according to nine specific selection criteria which are **contained in the LSC regulation** on competitive bidding for grants and contracts, 45 C.F.R Part 1634.9." Emphasis supplied. The nine criteria listed in the RFP track the exact language of that regulation. The listing does not mention the state planning process nor does it evince any concern by LSC about the number of programs." As in previous competitions, CCLS submitted an application for funding and was the only competitor for the service area.

In December 1999, LSC issued its award letters to successful applicants. The letter to CCLS stated that CCLS would be awarded funding for a term of only one year and that there would be yet another round of competition in the spring of 2000. Explaining the decision to shorten the grant period, McKay stated that " the service areas in your state period have been designated as eligible for three year terms. However, grants to recipients in your state are being made for one year **for programs to continue the address the questions presented in Program Letters 98-1 and 98-6.** As a part of this effort, we expect you will examine whether the current configuration of LSC-funded programs facilitates development of a comprehensive integrated system." The only authorities cited in the award letter to justify the action taken were the program letters. The award letter contained no mention of competition, nor did it attempt to explain how using criteria not found in the RFP was consistent with a competitive process."

In January, 2000 LSC followed up the award letter with additional efforts to force a reduction in the number of LSC funded programs in Virginia. On January 3, LSC official Randi Youells wrote a letter to Virginia programs demanding that a report be submitted by March 20, 2000. In her letter, Youells stated that it was "our expectation that we will see a plan that not only tells us **where the state is going and how it is going to get there but persuades us that the**

people involved in the planning process set aside their personal biases and endeavored to create a plan that has the potential of creating the optimal legal services delivery system for your state. (Emphasis added) The Youells letter contained no mention of the word "competition" nor did it explain the connection between "state planning" and the competitive regime established by Congress.

On January 21, 2000, LSC exerted the last piece of pressure. At a meeting of Virginia programs, LSC official John Eidleman announced that he had recently been in touch with President McKay about the situation in Virginia. According to Eidleman, McKay had stated that although he wanted one statewide program in Virginia, he was willing to settle for four to six programs.

Eidleman's message in combination with the Youells's directive to produce a report by March 20 was a bombshell. As a result of the LSC directives, the planning process became totally focused on developing a plan which reduced the number of service areas to accommodate McKay's wishes. CCLS and its director responded to the LSC actions in a different way–bringing suit in United States District Court in February 2000. In their suit, appellants challenged the shortening of the grant period and the proposed decision to eliminate the service area which CCLS had served for 20 years. As part of their challenge, appellants explicitly alleged that LSC had two agendas–a public agenda giving lip service to competition, and a covert managerial agenda which was completely antithetical to that fair and open competitive regime which Congress sought to establish when it enacted the 1996 appropriations law.

On March 20, the deadline set by Youells, David Neumeyer the president of the Virginia planning assembly, submitted a report supporting a reduction in the number of Virginia programs and creation of a single service area for that part of Virginia west of Roanoke. On March 31, appellant O'Donnell submitted a Comment to LSC criticizing the Neumeyer report. As attachments to his Comment, O'Donnell included statements from

organizations serving low income people, a bar association and a circuit court judge. All of the attachments objected to plans to create a single service area for Southwest Virginia and the failure to involve others besides legal service programs in the so-called planning process. LSC offered no response to O'Donnell's Comment; instead, on April 4, 2000, in an RFP for the competition for f.y.2001 it announced a new service area for Southwest Virginia, combining three service areas into one and eliminating the coalfield region as a separate service area.

After an accelerated discovery schedule, trial was held in Big Stone Gap, Virginia on June 5, 2000. A few days before trial, the executive director of the Southwest Virginia Legal Aid Society announced that it was filing an application for the combined service area. (In the discovery submitted a few days before trial, LSC admitted that the SWVLAS director was receiving information, counsel and advice from LSC staff including appellee Eidleman concerning the grants competition) At the trial on June 5, the trial court issued a bench opinion. Explicitly discussing *Regional Management Corporation, Inc. v. Legal Services Corporation* 186 F.3d 457(4th Cir.1999), the court distinguished it from the case at bar on grounds that it did not involve a grantee of LSC funds. Citing *Spokane County Legal Services, Inc. v. Legal Services Corporation,* 614 F2d 662 (9th Cir. 1980) for the proposition that the court could reach the merits of plaintiffs' claim, the trial court used a rational basis standard to find that LSC's actions were permissible under the LSC Act. Rejecting plaintiffs' claim that because the consolidation policy had not been approved by the LSC Board, it was ultra vires, the trial court found that it was an "official policy" of the Corporation and there is "no evidence that this policy requires approval of the Board of Directors." (App. 9)

The trial court's opinion did not discuss or even mention the 1996 appropriations law requiring competitive bidding nor did it consider the implications of service area

consolidation for competition. It did find that "the past competitive process has not been unfair, and there is no evidence that it has been anti-competitive" (App. 9)

Plaintiffs prosecuted a timely appeal to the Court of Appeals. The gravamen of Plaintiffs' appeal was that the trial court had failed to consider the conflict between LSC's "official policy" and actions mandating and implementing a reduction in the number of programs and the competitive regime established by federal law and LSC's own regulations. The appeal also challenged the trial court's conclusion that a radical revamping of the national system for delivery of legal services to low income people could be legitimately accomplished without any action whatever by the LSC Board.

On June 25, 2001, the Court of Appeals issued its *per curiam* unpublished opinion which vacated the lower court opinion and directed the lower court to dismiss the action. Instead of addressing the merits of the appeal, the court held that under its decision in *Regional Management v. Legal Services Corporation,* 186 F3d 457 (4th Cir. 1999), CCLS had no right to bring an action challenging the actions of the Legal Services Corporation. In its opinion, the appeals court noted that the position it was asserting was inconsistent with the positions of other circuits. After the court's decision, the Legal Services Corporation sought publication of the *per curiam* decision but the court rejected the motion. This petition followed.

REASONS FOR GRANTING THE WRIT

Oral argument in this case was on February 28, 2001. On that very date, this court issued its opinion in the case of *Legal Services Corporation v. Velasquez,* ___ U.S ___ (2001). Velasquez was a suit brought by lawyers who worked for programs funded by the Legal Services Corporation which challenged on constitutional grounds certain restrictions on representation which were a condition of such funding. In

ruling against the Legal Services Corporation and in favor of the lawyers, this court had little trouble recognizing that the actions of LSC had significant and direct impact on the First Amendment rights of the lawyers, and that under such circumstances judicial review ought to be available.

Although the case at bar does not raise the constitutional issues present in *Velasquez,* under the unpublished *per curiam* decision at issue in this petition, the court seems to be adopting the position that actions of the Legal Services Corporation are not subject to a private right of action under any circumstances. Although there was copious evidence that as a grantee of LSC funds, CCLS was directly and significantly injured by actions of LSC shortening the grant term and combining the service areas, under the theory of the lower court, CCLS had no right to seek judicial review of those actions.

As authority for its radical limit on the right of an LSC grantee to seek the judicial review this court allowed in *Velasquez,* the court cites a single authority, the majority opinion in *Regional Management v. Legal Services Corporation,* 186 F.3d 457(4th Cir. 1999). According to the court, the reasoning of that opinion is "controlling here." (App. 4) Petitioner respectfully disagrees with that analysis.

The petition for a writ of certiorari should be granted because the unpublished *per curiam* decision below:

(1) conflicts with the decisions of at least three other circuits directly holding that LSC grantees have the right to seek judicial review of actions by the Legal Services Corporation affecting funding.

(2) conflicts with the federal statutes requiring the Legal Services Corporation to establish a competitive bidding system for the award of grants

1. The writ should be granted to resolve the serious conflict between the decision below and the decisions of three other courts of appeals that have held that LSC grantees have a right to seek judicial review of decisions affecting funding.

The decision in *Regional Management* designated as "controlling" by the court below was an action brought by third parties seeking judicial review of the Legal Services Corporation's resolution of a complaint that LSC grantees that violated restrictions contained in the LSC act. As the trial court noted in its bench opinion, the plaintiff was not a grantee under the LSC act. In choosing to extend the holding of *Regional Management* to grantees, the lower court not only ignored a clear and meaningful distinction but also disagreed with the decisions of three other circuits.

The following circuits have expressly found that LSC grantees have a right to judicial review of decisions by LSC affecting funding:

D.C. Circuit	*Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.* 940 F.2d 685 (D.C. Cir. 1991)
1st Circuit	*San Juan Legal Servs., Inc. v. Legal Servs. Corp.* 655 F.2d 434 (1st Cir. 1981)
9th Circuit	*Spokane County Legal Servs., Inc. v. Legal Servs Corp.* 614 F.2d 662 (9th Cir. 1980)

The lower court mentions the above cases in an unnumbered footnote which acknowledges that they afford judicial review to LSC grantees. It then states that "we find these cases to be distinguishable for the reasons stated in *Regional Mgm't,* 186 F.3d at 464.

The lower court's claim that the discussion appearing at the cited portion of *Regional Mgm't* offers some clue to its decision to extend the holding in that case to LSC grantees such CCLS does not withstand scrutiny. The discussion at p. 464 does not deal at all with distinctions among LSC grantees, but with the distinction between cases involving grantees and one which clearly did not–the case at bar. Instead of forthrightly recognizing that it was directly disagreeing with those circuits which had found that LSC grantees had a right to judicial review of decisions affecting funding, the lower court evades the issue by claiming that the decisions are mysteriously distinguishable.

This court should clear up the mystery by recognizing that the decision of the lower court cannot be reconciled with the decisions of three other circuits. In those circuits where judicial review is recognized, it is also recognized that although LSC is not an agency of the federal government, "it is invested with broad administrative authority to carry out the terms of a federal statute; for that reason its actions must be viewed as those of a public rather than a private actor...Furthermore, although Congress clearly meant to insulate LSC from the vagaries of political pressure by making it an independent corporation rather than a federal agency, we can find nothing in the Act or the legislative history to suggest that it meant to insulate LSC's actions from judicial review." *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp,* 940 F.2d 685, 697(D.C. Cir. 1991) In contrast to the vision of accountability found in the foregoing cases, the decision below offers a license for LSC to do anything it wants, whenever it wants, to whomever it wants without fear of consequence. In a democratic society, offering such permission to a bureaucracy that is also "free from the vagaries of political pressure" is a prescription for arbitrary and capricious action.

2. The decision below is inconsistent with federal law requiring LSC to establish a competitive system for the award of grants.

As a second basis for awarding certiorari, petitioner contends that the decision of the court below undermines federal statutory requirements that LSC establish and implement a meaningful system of competition. In its *per curiam* decision, the lower court states that "although legal services programs such as CCLS are an integral part of the process of delivering those services, the programs themselves are not the beneficiaries of the Act. Because CCLS is not part of the class Congress sought to benefit in enacting the LSCA, we must contend that Congress did not intend to imply a private cause of action by CCLS **to challenge the LSC's exercise of its statutory and regulatory duties."** (App. 4, Emphasis supplied)

On its face, the above language shows that in reaching its conclusions the lower court - - like the trial court - - looked only to the LSC Act and not to the 1996 appropriations laws requiring LSC to establish a system of competitive bidding.

With enactment of the 1996 law, a whole new set of duties and responsibilities devolved on the Legal Services Corporation, duties and responsibilities which go identifiably beyond what was required by the LSC Act. Under the 1996 law, LSC was required to distribute funds for the delivery of legal services by means of a new competitive system.

Not only does the court below ignore the 1996 laws, it also mischaracterizes the gravamen of petitioner's claims as a challenge to "LSC's exercise of its regulatory and statutory duties." As the trial court conceded in its bench opinion, there was nothing "statutory" or "regulatory" about the "official policy" of the Corporation seeking to reduce the number of programs. (App. 9) On the contrary, the "official policy" implemented at the expense of local grantees such as CCLS was purely a initiative by LSC

managers. Neither the LSC Board nor Congress had ever indicated that the number of programs was a problem requiring solution. Indeed, to the extent that Congress had taken a position on how to improve the delivery of legal services, the solution it required was not consolidation of programs but competition.

Is a program of state planning having as its goal a reduction in the number of programs and a creation of bigger programs serving larger service areas consistent with the competitive agenda which Congress established in enacting the 1996 laws? Does the creation of large service areas promote competition or does it in fact serve to reduce the number of competitive opportunities? These are the central, over-riding questions of this litigation - - questions which both the trial court and the court below studiously avoided. If the decision of the court below is allowed to stand, then the question will never be decided.

In the "tobacco case" *FDA v. Brown and Williamson*, 146 L.Ed.2d 121 (2000), this court held that clear Congressional enactments ought not to be undone by the too clever - - by - - half interpretations of un-elected bureaucrats. The situation here presents a similar case of bureaucrats' running amok. Using incidental, ministerial aspects of the competitive bidding process involving service areas and grant terms, the LSC president and his henchmen have managed to totally undo the competitive process which Congress required in the 1996 appropriation laws. Instead of increasing competitive opportunity grounded in local control of resources as a vehicle for improving the quality of services as Congress intended, LSC management have used threats and intimidation in the service of state planning, centralized authority and program consolidation. Only by taking this case and examining the questions presented by it can this court re-iterate the principle that law is and ought to be superior to the whim of bureaucrats.

CONCLUSION

The decision of the Fourth Circuit denying to LSC grantees the opportunity to seek judicial review of actions by the Legal Services Corporation which directly and significantly affect their very existence is an utterly anomalous decision. All of the other circuits which have considered the issue of judicial review have found that the Legal Services Corporation is not beyond the law when it comes to actions affecting LSC grantees. Only in the Fourth Circuit are the arbitrary and capricious actions of LSC bureaucrats insulated from any accountability–even where the actions constitute the radical destruction of a clearly enunciated statutory scheme. The writ of certiorari should be granted to resolve the conflict, and to enable this court to consider the lawless arbitrary conduct which is at the heart of Petitioner's complaint.

Respectfully Submitted,

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HUGH F. O'DONNELL, Executive Director of Client Centered Legal Services of Southwest Virginia, Incorporated; CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INCORPORATED,
Plaintiffs-Appellants,

v. No. 00-1901

JOHN EIDLEMAN, Program Specialist for the Legal Services Corporation; LEGAL SERVICES CORPORATION; JOHN MCKAY, President of the Legal Services Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap.
James P. Jones, District Judge.
(CA-00-33-2)

Argued: February 28, 2001
Decided: June 25, 2001
Entered: June 25, 2001

Before WILKINS and WILLIAMS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Vacated and remanded with instructions by unpublished per curiam opinion.

COUNSEL ARGUED: Gerald L. Gray, GERALD GRAY LAW FIRM, Clint wood, Virginia, for Appellants. Thomas Samuel Williamson, Jr., COVINGTON & BURLING, Washington, D.C., for Appellees. **ON BRIEF:** Andrew J. Heimert, COVINGTON & BURLING, Washington, D.C.; Paul R. Thomson, Jr., WOODS, ROGERS & HAZLEGROVE, P.L.C., Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION PER CURIAM:

Client Centered Legal Services of Southwest Virginia, Incorporated and Hugh F. O'Donnell, its executive director (collectively, "CCLS"), appeal an order of the district court granting judgment in favor of the Legal Services Corporation and two of its officers (collectively, "the LSC") on CCLS's claims that various actions by the LSC exceeded its statutory and regulatory authority. For the reasons set forth below, we conclude that Congress has not authorized judicial review of these claims. We therefore vacate and remand with instructions to dismiss.

I.

In 1974, Congress enacted the Legal Service Corporation Act ("LSCA"), which created the LSC for the purpose of providing legal assistance to indigent people in civil matters. See 42 U.S.C.A. § 2996 (West 1994). The LSC does not itself provide legal services, but rather grants federal funds to legal services programs across the country. CCLS, which provides legal services to indigent people in the coalfields region of southwestern Virginia, has been an LSC grantee since 1980.

This litigation involves CCLS's challenge to certain actions taken by the LSC in connection with the LSC's consolidation of services areas (undertaken as a cost-cutting measure) and implementation of a competitive bidding program for grant money. Following a bench trial, the district court rejected CCLS's claims on the merits.

II.

In our recent decision in Regional Management Corp. v. Legal Services Corp., 186 F.3d 457 (4th Cir. 1999), we concluded that a decision by the LSC regarding certain lobbying practices by grant recipients was not subject to judicial review in an action by a lender claiming injury as a result of such lobbying. See Reg'l Mgmt., 186 F.3d at 461-64. First, we concluded that the LSC is not a federal agency for purposes of judicial review under the Administrative Procedures Act. See id. at 462. Second, we held that the LSCA did not explicitly authorize a private right of action against the LSC. See id. Finally, we determined that "there [was] no basis for finding that Congress intended to create an implied private right of action" against the LSC. Id.

In determining that Congress did not implicitly establish a right of action, we considered the four factors set forth in Cort v. Ash, 422 U.S. 66, 78 (1975) (internal quotation marks omitted): (1) whether "the plaintiff [is] one of the class for whose especial benefit the statute was enacted"; (2) whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether "it [is] consistent with the underlying purposes of the legislative scheme to imply such a remedy"; and (4) whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." We determined that the first Cort factor was controlling: Lenders affected by the lobbying activities of LSC grantees

were not "part of any special class to be benefitted by" the LSCA. Reg'l Mgmt., 186 F.3d at 463 (internal quotation marks omitted). Rather, we noted that Congress specifically intended the LSCA to benefit "indigents who have legal grievances but who are unable to afford the legal means necessary to redress them." Id. (internal quotation marks omitted).

The reasoning of Regional Management is controlling here. As we held in Regional Management, the LSCA was intended by Congress for the "especial benefit" of indigent persons in need of legal services. Although legal services programs such as CCLS are an integral part of the process of delivering those services, the programs themselves are not the beneficiaries of the Act. Because CCLS is not part of the class Congress sought to benefit in enacting the LSCA, we must conclude that Congress did not intend to imply a private cause of action by CCLS to challenge the LSC's exercise of its statutory and regulatory duties.*

III.

For the reasons set forth above, we conclude that the district court was without authority to review the actions of the LSC. Accordingly, we vacate the order of the district court and remand with instructions to dismiss.

Vacated And Remanded With Instructions

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* We note that three other circuits have concluded that rational basis judicial review is available for decisions of the LSC that affect grantees. See Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 697 (D.C. Cir. 1991); San Juan Legal Servs., Inc. v. Legal Servs. Corp., 655 F.2d 434, 438-39 (1st Cir. 1981); Spokane County Legal Servs., Inc. v. Legal Servs. Corp., 614 F.2d 662, 668-69 (9th Cir. 1980). We find these cases distinguishable for the reasons stated in Regional Management. See Reg'l Mgmt., 186 F.3d at 464.

* * *

THE COURT: The following will constitute the Court's findings of fact and conclusions of law. The Legal Services Corporation was created in 1974 by Congress for the purpose of providing financial support, local assistance in noncriminal proceedings to persons unable to afford legal assistance.

Of course, it does not provide legal services itself, but provides grants to legal services providers throughout the nation which, in turn, provide legal services to their clients.

In 1996 Congress passed legislation in the form of the Appropriations Act that requires LSC to institute a system of competitive bidding. This has been referred to as Public Law Number 104-134, and specifically section 503 of that law.

That legislation also directed LSC to quote, "define geographic areas," unquote, for the purposes of this funding. Since then the appropriations acts have restated or adopted by reference these provisions of the 1996 Appropriations Act.

As part of this competitive bidding process, LSC publishes a request for proposals, also known as an RFP, each year for grants the following year.

Now, the plaintiff, Client Centered Legal Services of Southwest Virginia, CCLS, was established in 1970, and has a well deserved reputation for aggressive and competent representation of its low income clients.

Its present service area is the so-called coalfield area of Southwest Virginia, the seven counties and one independent city in which coal mining has traditionally been the primary industry.

CCLS has been a grantee for some years. Recently it was given a two year grant for fiscal years 1998 and 1999. This tow year grant was the same length as other grants given to legal services providers in Virginia that year.

In 1998 LSC issued so-called Program Letters 98-1 and 98-6. These letters posed a variety of questions to which LSC sought responses relating to state wide planning from its Virginia grantees, including questions concerning consolidation of programs.

In the spring of 1999 LSC published its RFP for grants for the fiscal year 2000 in Virginia, as elsewhere. And in December of 1999 CCLS was awarded a one year grant for its traditional service area. Other services in Virginia received one year grants.

In January of this year Legal Services employee Randi Youells wrote a letter to the Legal Services Corporation of Virginia, LSC Virginia, asking that the Virginia grant recipients consider these issues concerning consolidation programs and other structural changes.

In response, representatives of the Virginia grant recipients, and others, held a series of meetings which culminated in the submission to LSC of a report entitled Virginia Client Legal Services Delivery System Planning Report, in which it was proposed that the number of service areas in Virginia be reduced to six or seven.

Prior to that report at a meeting on January 21, 2000, the defendant, John Eidleman, and employee of LSC, told the assembled interested parties that LSC wanted a range of programs from four to six down from the current 12 service areas in Virginia. He asked that those present give advice to LSC in this matter since LSC had not made a decision at the time of the proper number of service areas.

And I explicitly accept Mr. Eidleman's testimony. No such decision had been made at that time.

LSC subsequently adopted the proposed revisions to the boundaries of the service areas in Virginia of seven, and since then implemented them in the RFP that it issued in April of this year for grants for fiscal year 2000.

The actual grant proposals are due on July 17, 2000 and will likely be determined in December of this year.

Now, in this RFP for fiscal year 2001, the service area of CCLS, that is which CCLS is currently serving, has been combined with the service areas now served by two other local legal aid agencies that extend, as has been emphasized in the evidence, from the tip of Virginia in Lee County through Southwest Virginia, including Montgomery County, a large geographical area.

LSC takes the position that Virginia's service area, including service areas in Southwest Virginia, should be consolidated in order to save administrative costs to allow the sharing of expertise and resources, and to provide a larger base for community and political support of the programs.

The plaintiffs contend, on the other hand, that the merger of programs, or service areas, will contravene the Congressional ideal of local control of these programs, cause disruption and ultimately harm to their clients.

The base claim by the plaintiffs is that LSC's plans to reduce the number of programs or service areas of Virginia is ultra vires, or beyond their power. They content that LSC does not have discretion to change the boundaries of service areas, or to request the merger of programs, and in doing so is acted arbitrarily, and with an abuse of discretion.

Now, a preliminary consideration in this case is whether, in fact, the plaintiffs have a cause of action. In fact, a recent decision by the Fourth Circuit Court of Appeals in the case of Regional Management Corporation, Incorporated v. Legal Services Corporation, 186 F.3d 457 decided in 1999 creates some doubt as to whether plaintiffs can make any claim because Congress has specifically held that the Legal Services Corporation is not like other Government agencies, is not subject to the Administrative Process Act which generally gives citizens the right to seek judicial review of agency action. It is, in fact, a private corporation, although one funded by Congress.

The Act, itself, provides that LSC shall not be considered a "department, agency or instrumentality of the Federal Government," unquote, except with certain narrow exceptions.

In the Fourth Circuit case the Court held in the facts of this case there was no judicial review of LSC action available under the law in the federal courts.

Now, the Fourth Circuit case was not a case in which LSC grantee was making the claim, particularly since the defendants do not content that all judicial review is barred in this case. I will distinguish the Fourth Circuit case, and review the merits of the plaintiff's claim.

I have to emphasize, however, that my review is limited, and LSC's decisions need have only a rational basis, and show they are supported by some evidence. Spokane County Legal Services, Inc. v. Legal Services Corporation, 614 F.2d 662 (9th Cir. 1980).

Now, in making this crucial decision, I may not simply substitute my notions of what is best for that of LSC. Whether or not a merger of programs or service areas is ultimately best or could be accomplished in some other better way is not at bottom a decision that this Court is empowered to make under the law.

In fact, the plaintiffs' arguments that smaller is better and that its success over the last number of years in providing legal services to its deserving clients certainly rings a cord with me. I accept the evidence that's been resented, and I, in fact I'm aware from my other experiences in this court that Client Centered Legal Services has done a good job, and has been an incubator and leader in services.

I can understand the depth of sincerity of its opposition to this planned change. However, I must find that there is a rational basis for LSC's action, and that end the Court's inquiry.

Now, other supplemental arguments have been made. The plaintiffs contend that the Board of Directors of LSC has not approved this merger program, but there is no evidence that this policy requires approval of the Board of Directors.

The evidence is clear that this is an official policy of the corporation, directed by its chief executive officer, and I do not find that it is ultra vires in any way.

It is also argued that LSC did not follow the consideration factors set forth in program letter 98-1. But, in fact, LSC has the power to designate program areas and encourage merger programs, to meet those program areas, regardless of what is set forth in these program letters.

In fact, the letters do not equal consideration of all the factors, and I expect that factor number tow, the geographical and historical distinctions and affinities was a principal concern of the affected agencies when they made their recommendations to LSC.

I find nothing irrational in these distinctions. Similarly, whether there were sufficient stakeholders involved is not legally relevant. The bottom line is that LSC could have legally made its decision without any input.

Next, neither the RFPs nor any law requires a three year grant of finding. The applicable RFPs expressly state the grants would be awarded for periods of up to three years, and that grants would be awarded for periods ranging between one and three years.

There's been no evidence that LSC committed, at any time, to permit three years of funding to any grantee, and no law or regulation requires it. The fact that the program letters were not published in the federal register is irrelevant since LSC had the right to fix the service areas.

The past competitive process has not been unfair, and there is no evidence that it has been anti-competitive, or that CCLS was unaware of any relevant factors in making its applications in the past.

Finally, there has been no evidence introduced of any improper interference with Legal Services Corporation of Virginia. Counsel for the plaintiffs has requested alternative relief in regard to joint applications.

The evidence was clear that while LSC may accept joint applications for multiple agencies from particular service areas, it is unlikely to do so since it believes that such an approach would be contrary to its rationale for consolidation.

It is also clear that LSC has no legal power to merge or consolidate local grantees or programs, but it certainly desires that, since it feels that single grantees are preferred for a single service area.

For the reasons I've stated, this is a legally proper position for LSC to take, and I am inclined to grant any such alternate relief.

For the reasons stated, I will enter judgment for the defendants in this case. Final judgment will be entered. We'll adjourn Court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

HUGH F. O'DONNELL, ET AL.,)	
	)
Plaintiffs,	) Case No. 00CV00033
	)
v.	) **FINAL JUDGMENT**
	)
JOHN McKAY, ET AL.,	) By: James P. Jones
	) United States District Judge
Defendants.	)

Entered: June 6, 2000

For the reasons stated on the record on June 5, 2000, it is **ADJUDGED AND ORDERED** that all relief requested by the plaintiffs is denied and judgment is entered on the merits for the defendants.

The clerk is directed to close the case.

Enter: June 5, 20000

\s\ James P. Jones
United States District Judge

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REGIONAL MANAGEMENT
CORPORATION, INCORPORATED;
REGIONAL FINANCE CORPORATION
OF SOUTH CAROLINA, INCORPORATED, and
REGIONAL FINANCE CORPORATION
OF GEORGIA, INCORPORATED,
Plaintiffs-Appellees,

v. No. 98-2165

LEGAL SERVICES CORPORATION,
Defendant-Appellant.

REGIONAL MANAGEMENT
CORPORATION, INCORPORATED;
REGIONAL FINANCE CORPORATION
OF SOUTH CAROLINA, INCORPORATED, and
REGIONAL FINANCE CORPORATION
OF GEORGIA, INCORPORATED,
Plaintiffs-Appellants,

v. No. 98-2166

LEGAL SERVICES CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court
for the District of South Carolina, at Greenville.
Henry M. Herlong, Jr., District Judge.
(CA-97-1311-6-20)

Argued: May 5, 1999
Decided: July 28, 1999
Entered: July 28, 1999

Before MURNAGHAN, LUTTIG, and WILLIAMS, Circuit Judges.

Vacated and remanded in part and affirmed in part by published opinion. Judge Luttig wrote the opinion, in which Judge Williams joined. Judge Murnaghan wrote a separate concurring opinion.

COUNSEL ARGUED: Susan Macdonald Glenn, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellant. Gregory J. English, WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellees. **ON BRIEF:** Joel H. Smith, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellant. Wallace K. Lightsey, Benjamin T. Zeigler, WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellees.

OPINION LUTTIG, Circuit Judge:

Appellees Regional Management Corp. and its affiliates (collectively "Regional") filed a complaint with the Legal Services Corporation alleging that certain recipients of Legal Services' funds violated the Legal Services Corporation Act ("LSC Act") when they lobbied against Regional before the South Carolina General Assembly and the Georgia Commissioner of Insurance. Legal Services concluded that neither instance of lobbying violated the LSC Act, and Regional sought judicial review in federal district court of the Corporation's resolution of its complaint. The district court ruled in favor of Regional with regard to the lobbying in South Carolina, but in favor of Legal Services with regard to the lobbying in Georgia.

For the reasons that follow, we conclude that there is no basis for judicial review of Legal Services' decision on Regional's complaint.

We therefore vacate the district court's judgment and opinion and dismiss Regional's claim. We also affirm the district court's dismissal of Regional's suit against Legal Services under the Freedom of Information Act, because that suit is not yet ripe.

I.

Appellant Legal Services, which Congress established by the LSC Act, 42 U.S.C. §§ 2996-2996l, disburses federal money to local legal services programs, known as "recipients," to support legal assistance to the poor in civil matters. The LSC Act, however, imposes numerous restrictions on recipients' use of Legal Services' funds, id. § 2996f(a)&(b), and charges Legal Services with enforcing those restrictions, id. § 2996e(b).

Among the funding restrictions that the LSC Act imposes is a ban on lobbying federal, state, or local officials, whether executive or legislative. Id. § 2996f(a)(5). There are some exceptions to this ban, however, such as for lobbying that is "necessary to the provision of legal advice and representation" of an "eligible client . . . with respect to such client's legal rights and responsibilities," or for testimony or similar activity that has been requested by an agency or legislative body. Id. Regulations promulgated by Legal Services pursuant to the LSC Act implement the lobbying ban and the exceptions. See 45 C.F.R. pt. 1612.[1]

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[1] Congress has, in recent years, used annual appropriations bills to impose further restrictions on lobbying, which has led Legal Services to modify its regulations. See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp., 145 F.3d 1017, 1021-22 (9th Cir.), cert. denied, 119 S. Ct. 539 (1998).

Appellee Regional is a lender, apparently concentrating on providing credit to those who have poor credit histories or are otherwise high credit risks. In 1994-95, the time of the underlying events in this case, Legal Services' recipients included Palmetto Legal Services, Inc. ("PLS"), South Carolina Legal Services Association ("SCLSA"), and the Neighborhood Legal Assistance Program ("NLAP"). SCLSA received its funding via PLS. During this time, Susan Berkowitz, an attorney, registered lobbyist, and the director of SCLSA, successfully lobbied the South Carolina General Assembly to pass Act 135 of 1995, which imposed severe restrictions upon companies such as Regional, costing it, Regional contends, millions of dollars in lost revenue. Soon thereafter, Berkowitz, joined by employees of PLS and NLAP, journeyed to Georgia at the request of the Georgia Commissioner of Insurance, where they successfully opposed Regional's application for a license to do business in that State.

In February 1996, Regional filed a complaint with Legal Services pursuant to the complaint procedure of 45 C.F.R. § 1618.3, claiming that both the South Carolina and the Georgia lobbying violated the LSC Act and the then-applicable regulations. Soon thereafter, Regional, concerned that Legal Services might be receiving inaccurate information from the recipients, Berkowitz, and others, filed several requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, which applies to Legal Services pursuant to 42 U.S.C. § 2996d(g), for all documents that Legal Services had created or received as part of the investigation. Legal Services denied these requests, invoking its policy of not releasing documents relating to an ongoing investigation to a target of that investigation and concluding that the policy should extend to Regional's request. In December 1996, Legal Services issued its decision, concluding that there was no violation of the LSC Act or

regulations in either lobbying incident and, thus, that no disciplinary action was needed. It thereupon produced the documents that Regional had requested under FOIA.

Regional filed the present action in the federal district court in May 1997, seeking "judicial review" of Legal Services' "final agency action." Regional requested a declaratory judgment that the lobbying violated the LSC Act; restitution of funds to Legal Services; termination of funding to PLS, SCLSA, and NLAP;[2] and termination of the offending employees of those recipients. In a second cause of action, Regional alleged violations of FOIA.

The district court, in a thorough opinion, 10 F. Supp. 2d 565 (D. S.C. 1998), first concluded that it had jurisdiction to hear Regional's challenge to Legal Services' decision. Although the court agreed with the numerous courts that have held that the LSC Act creates no private right of action, and also concluded that the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., do not provide a basis for reviewing Legal Services' decision, see 42 U.S.C. § 2996d(e)(1), it followed the lead of several courts that have nonetheless found authority to review certain Legal Services actions under a pre-APA standard of review, which requires a court to consider only whether an agency action has a rational basis. The district court viewed this standard of review, however, as functionally identical to the APA's "arbitrary and capricious" standard of review, see 5 U.S.C. § 706(2)(A).

On the merits, the district court first held that there was no rational basis for Legal Services' conclusion that Berkowitz's lobbying in South Carolina was in the service of

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[2] Although SCLSA apparently no longer receives funds from Legal Services, PLS still does. We therefore reject Legal Services' claim that Regional's suit is moot regarding the South Carolina incident.

a client. That conclusion by Legal Services, the court explained, was devoid of factual support, and the lobbying was thus a blatant violation of the LSC Act and regulations. The court held that Legal Services had a rational basis for concluding that the Georgia lobbying fell under the exception for testimony requested by a governmental official. Finally, the court dismissed Regional's FOIA claim as moot because Regional had received the requested documents.

Legal Services appeals from the district court's ruling with regard to the South Carolina lobbying and chiefly argues that the district court should not have reached the merits of the dispute regarding that lobbying incident (or the one in Georgia), because there is no basis for judicial review of Legal Services' decision on Regional's complaint. Regional cross-appeals from the district court's ruling on the Georgia lobbying and also from the dismissal of its FOIA claim.

II.

The chief, and ultimately dispositive, issue before us is whether Legal Services' decision that Legal Services' recipients did not illegally lobby against Regional in either South Carolina or Georgia is subject to judicial review. Because Congress has exempted such a decision by Legal Services from review under the APA, and because nothing in the LSC Act itself provides Regional a private right of action against Legal Services, we conclude that Regional has no basis for obtaining judicial review of Legal Services' resolution of its complaint.

There are generally only two possible bases for judicial review of federal agency action. First, and most often applicable, is the APA, which "provides the generally applicable means for obtaining judicial review of actions taken by federal agencies." Clouser v. Espy, 42 F.3d 1522,

1528 n.5 (9th Cir. 1994). Second, a substantive statute may provide a private right of action for judicial review of an agency action. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882 (1990) (suggesting that only a "specific authorization in the substantive statute" or "the general review provisions of the APA" would permit judicial review of the agency action that respondent challenged); id. (noting that respondent "does not contend that either[of the substantive statutes that the agency allegedly violated] provides a private right of action for violations of its provisions. Rather, respondent claims a right to judicial review under . . . the APA."); Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 49-50 (D.C. Cir. 1981) (holding that APA provided "appellants' only basis for judicial review," since Noise Control Act, which agency had allegedly violated, provided no private right of action). See also Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 1999 WL 184610, * 3, 8-9 (4th Cir. 1999).[3]

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[3] The Supreme Court has suggested that there may be some exceptional cases where judicial review of agency action would always be available, even if Congress did not specifically authorize it (through the APA or otherwise) or actually precluded it explicitly, or at least that there are certain areas where the presumption in favor of judicial review is particularly strong. The two chief areas of this sort appear to be constitutional claims, see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672-73, 681 n.12 (1986); see also Webster v. Doe, 486 U.S. 592, 602 (1988); Heckler v. Chaney, 470 U.S. 821, 838 (1985); cf. Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995), and claims by a party facing a governmental action against it for violating regulations or laws whose applicability or validity it wishes to challenge, see Adamo Wrecking Co. v. United States, 434 U.S. 275, 278-79, 283 (1978); cf. F.C.C. v. Schreiber, 381 U.S. 279, 286-88 (1965). But Regional raises neither sort of claim, nor do we think any other special circumstance exists in this case. Indeed, if ever congressional preclusion of judicial review of an agency action were allowed, it would be here, where Regional, at bottom, is merely challenging a quasi-adjudication by Legal Services involving not the rights of Regional but those of Legal Services' own recipients.

When Congress in a substantive statute has not explicitly created a private right of action for review of an agency action, an implied one may exist in favor of a particular plaintiff, but only if Congress "intended to create the private remedy sought by the plaintiff[ ]." Suter v. Artist M., 503 U.S. 347, 364 (1992). See Cort v. Ash, 422 U.S. 66 (1975) (setting out factors to guide this determination). The burden is on the plaintiff to demonstrate such an intent, Suter, 503 U.S. at 364, and the requirement in order for a plaintiff to succeed is "a stringent one," Donaldson v. Department of Labor, 930 F.2d 339, 347-48 (4th Cir. 1991), particularly given the Court's generally "restrictive attitude," id., toward creating implied rights of action.

Applying the above rules to the particular agency action that Regional challenges - - that is, Legal Services' decision, in response to Regional's complaint, that its recipients did not violate 42 U.S.C. § 2996f(a)(5) when they lobbied against Regional - - it is clear that judicial review of such an action is not available to Regional. The APA's judicial review provisions unquestionably do not apply, and the LSC Act does not provide a private right of action to Regional to challenge such a decision by Legal Services.

First, the LSC Act, in conjunction with the APA, precludes judicial review under the APA of decisions such as the present one. The LSC Act provides that Legal Services "shall not be considered a department, agency, or instrumentality of the Federal Government . . . [e]xcept as otherwise specifically provided in this subchapter." 42 U.S.C. § 2996d(e)(1). With the exception of the two subsections immediately following this provision, id.§§ 2996d(f)&(g), which relate to particular aspects of employee benefits and to the applicability of FOIA to Legal Services, respectively, there is no provision in the LSC Act that appears to "specifically provide[ ]" for considering Legal

Services to be a federal agency.[4] More particularly, no provision of the LSC Act "specifically provide[s]" for considering Legal Services to be an agency with regard to its resolution of complaints alleging lobbying in violation of section 2996f(a)(5). Therefore, Legal Services may "not be considered," id.§ 2996d(e)(1), a federal agency for purposes of the action that Regional challenges. Since the APA's judicial review provisions apply only to action by a federal agency, see 5 U.S.C. § 702; id. § 704; see also Franklin v. Massachusetts, 505 U.S. 788, 796 (1992), judicial review of Legal Services' decision on Regional's complaint is not available under the APA. [5]

Second, the LSC Act creates no private right of action for Regional against Legal Services. It is undisputed that the Act provides no explicit private right of action, and there is no basis for finding that Congress intended to create an implied private right of action for Regional to challenge Legal Services' application of section 2996f(a)(5). Regional has certainly not satisfied its burden of showing an intent by Congress to create a right of action- -in its briefs it never even discusses the standards for meeting that

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[4] See also 42 U.S.C. § 2996c(g) (applying open-meeting requirements of 5 U.S.C. § 552b to Legal Services' Board and advisory councils). Cf. 5 U.S.C. App. § 8G(a)(2) (providing that Legal Services is a "Federal entity" for purposes of Inspector General Act).

[5] Our conclusion that there is no judicial review under the APA of the action that Regional challenges is consistent with the view of every other circuit court to consider the APA's applicability to actions by Legal Services. See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 696 (D.C. Cir. 1991); San Juan Legal Servs., Inc. v. Legal Servs. Corp., 655 F.2d 434, 438-39 (1st Cir. 1981); Spokane County Legal Servs., Inc. v. Legal Servs. Corp., 614 F.2d 662, 669 (9th Cir. 1980). See also Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 391-92 (1995)

burden.[6] Furthermore, we find no reason to suppose that Congress, while exempting from judicial review under the APA Legal Services' resolution of complaints involving section 2996f(a)(5), nevertheless, through its silence in the LSC Act, intended to grant a private right of action to parties such as Regional to challenge that very same action. See Carlin v. McKean, 823 F.2d 620, 622-23 (D.C. Cir. 1987). Cf. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 395 & n.9 (1987); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986); (viewing question of whether plaintiff had basis for judicial review as simply one of whether APA provided one, where substantive statutes did not include provisions for judicial review of agency action); Barlow v. Collins, 397 U.S. 159, 173 (1970) (opinion of

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[6] To the extent that Regional does make an argument that an implied right of action exists in a case such as this, that argument appears to be twofold, and is unconvincing. First, Regional contends that because section 2996f(a)(5) imposes a duty on Legal Services to enforce its limitations, see 42 U.S.C. § 2996f(a)(5) ("[T]he Corporation shall . . . insure that no funds made available to recipients" are used for unauthorized lobbying), there must be some judicial means for Regional to enforce this duty. Regional's conclusion, however, does not follow from its premise, because Congress need not, and indeed often does not, rely on private parties to enforce statutory duties. See,e.g., Suter v. Artist M., 503 U.S. 347, 360-61, 363-64 (1992); California v. Sierra Club, 451 U.S. 287, 295 (1981). Such is the case in the LSC Act. See Grassley v. Legal Servs. Corp., 535 F. Supp. 818, 824-25 (S.D. Iowa 1982) (surveying the LSC Act, and concluding that "[t]he legislative scheme, therefore, is one of Corporation and, ultimately, congressional oversight. The presence of a nonjudicial means of enforcement is indicative of a congressional intent not to create an implied private cause of action.").

Second, Regional appears to contend that it should have a right of action simply because it exhausted Legal Services' complaint procedures before suing in federal court. But the existence of a right of action and of an exhaustion requirement are separate issues, even though complying with the latter, where it exists, is usually a condition for invoking the former. See, e.g., Block v.Community Nutrition Inst., 467 U.S. 340, 346-47 (1984); Volvo GM Heavy Truck Corp. v. Department of Labor, 118 F.3d 205, 209-11 (4th Cir. 1997); Grassley, 535 F. Supp. at 827.

Brennan, J.) ("When the legality of administrative action is at issue," and a statute has "preclude[d] judicial review" under the APA, "the plaintiff is out of court.").

Nothing in the terms of the LSC Act suggests that parties such as Regional are part of any "special class to be benefitted by," Cannon v. University of Chicago, 441 U.S. 677, 690 (1979), the Act in general or section 2996f(a)(5) in particular. Indeed, Congress in the LSC Act as a whole specifically identified another group as the Act's special beneficiaries - - that is, "indigents who have legal grievances but who are unable to afford the legal means necessary to redress them." Grassley v. Legal Servs. Corp., 535 F. Supp. 818, 823 (S.D. Iowa 1982) (holding that LSC Act provides no implied cause of action to enforce its bans on lobbying and certain political activities). See 42 U.S.C. § 2996 (congressional findings and declaration of purpose). Further, the intended special beneficiaries, if any, of section 2996f(a)(5)'s limitations upon lobbying are not those against whom Legal Services' recipients might lobby, but rather the recipients' clients, who benefit by having the Legal Services program protected from political pressures. See 42 U.S.C.§ 2996(5) (congressional finding that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures"). More likely, however, there is no special beneficiary of that section, since it is "no more than a general proscription of certain activities," Grassley, 535 F. Supp. at 822. And "a general proscription of certain activities . . . does not indicate an intent to provide for private rights of action." California v. Sierra Club, 451 U.S. 287, 294 (1981).[7]

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[7] We also note that the legislative history on the existence of a private right of action, to the extent that it provides any guidance, supports our conclusion. Compare Grassley, 535 F. Supp. at 823-24, 826, with Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 697 (D.C. Cir. 1991). Where neither the language nor legislative history of a statute suggests any intent to create a private right of action, there is no need to inquire further. Sierra Club, 451 U.S. at 297.

Finally, we address what appears to be Regional's primary argument for judicial review in this case. It relies upon three courts of appeals that have concluded that judicial review of certain actions by Legal Services was available and claims that the holdings of those cases should apply here. See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991); San Juan Legal Servs., Inc. v. Legal Servs. Corp., 655 F.2d 434 (1st Cir. 1981); Spokane County Legal Servs., Inc. v. Legal Servs. Corp., 614 F.2d 662 (9th Cir. 1980).[8] But because those cases are readily distinguishable, they do not assist Regional, and we take no position on whether they were correctly decided.

The cases upon which Regional relies are distinguishable for two reasons. First, they did not involve alleged violations of section 2996f(a)(5). Second, the provisions of the LSC Act that they did involve implicitly provide, at least arguably (and unlike section 2996f(a)(5)), for some sort of judicial review when Legal Services acts under them, because they impose on Legal Services some of the same requirements that the APA imposes on agencies subject to it. See Texas Rural, 940 F.2d at 690 (in challenge to regulations promulgated by Legal Services, explaining that "LSC . .. is required [under 42 U.S.C. § 2996g(e)] to engage in notice-and-comment rulemaking . . ., indicating that Congress intended that it be treated for these purposes like an agency of the government") (emphasis added); Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32, 44, 62 (D. D.C. 1998) (stating that Congress in section 2996g(e) "specifically provided," consistent with section 2996d(e)(1), for treating Legal Services as a federal agency, and explaining Texas Rural as holding that "the LSC Act impliedly provides for judicial review when LSC exercises its rulemaking authority vis-a-vis its grantees"); San Juan, 655 F.2d at 439 (noting, in

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[8] Regional also cites numerous district court opinions, but all from within the circuits that decided Texas Rural and Spokane County.

recipient's challenge to funding decision, extensive procedural rights that section 2996j provides to recipients whose funding Legal Services wishes to terminate, and concluding that Congress would not have "specifically provided" such rights "if it did not assume that judicial review would be available to a grantee who claimed that it was denied" those rights); Multnomah Legal Servs. Workers Union v. Legal Servs. Corp., 936 F.2d 1547, 1556 (9th Cir. 1991) (limiting Spokane County to "funding decisions" and emphasizing that "we are not free to read [section 2996d(e)(1)] out of the LSC Act").

Thus, whatever the bases for judicial review may have been in these cases, they were clearly derived from the particular provisions of the LSC Act before those courts.

We therefore hold that because nothing in the LSC Act "specifically provide[s]," 42 U.S.C. § 2996d(e)(1), for treating Legal Services as a federal agency, and thus as subject to the APA's provisions for judicial review, when it addresses a complaint alleging a violation of section 2996f(a)(5), and because nothing in the LSC Act itself provides to the alleged victim of that violation any basis for judicial review, Regional has no cause of action to challenge in federal court Legal Services' decision that its recipients did not unlawfully lobby against Regional. Accordingly, the proper course for the district court was to dismiss Regional's first cause of action without reaching its merits.

III.

In addition to its claim of a violation of the LSC Act, Regional also brought a claim that Legal Services violated FOIA, which specifically applies to Legal Services, see 42 U.S.C.§ 2996d(g), when it delayed its release to Regional of requested documents. The district court dismissed the FOIA claim as moot, because Regional has received those documents. We affirm, concluding that Regional's challenge to the particular alleged violation of FOIA from the delayed release of documents is moot for the reason that the district

court gave, and that its challenge to Legal Services' alleged policy of not disclosing to third parties documents relating to an ongoing investigation is not ripe for review.

It is undisputed that a challenge to a particular denial of a FOIA request becomes moot if an agency produces the requested documents. See, e.g., Payne Enter., Inc. v. United States, 837 F.2d 486, 490-91 (D.C. Cir. 1988). Thus, because Legal Services fully complied with Regional's requests in December 1996, when Legal Services completed its investigation, Regional's challenge to the denials of its requests prior to December 1996 is moot.

Regional argues, however, that it is also challenging the policy behind Legal Services' denials, and relies on Payne for the rule that such a suit does not become moot upon release of the requested documents. Payne, 837 F.2d at 491. See City of Houston v. Department of Housing and Urban Dev., 24 F.3d 1421, 1430 (D.C. Cir. 1994). Although Regional correctly states the rule of Payne (on whose merits we need not pass), a suit under that rule may only proceed if the claim is ripe, City of Houston, 24 F.3d at 1429-30; see Payne, 837 F.2d at 492-94; Webb v. Department of Health and Human Servs., 696 F.2d 101, 106-07 (D.C. Cir. 1982), and Regional's is not.

The inquiry to determine the ripeness of a claim is twofold, looking to "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." Abbott Lab. v. Gardner, 387 U.S. 136, 149 (1967). The question of an issue's fitness for judicial decision in turn has two parts - - (1) "the agency's interest in crystallizing its policy before that policy is subject to review"; and (2) "the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." City of Houston, 24 F.3d at 1430-31 (internal quotation marks omitted). A court must balance these two interests (the agency's and the court's) against the hardship to the plaintiff from withholding court consideration at a given time. See id.

Regional's claim is not ripe, because Legal Services' policy is not necessarily "crystallized"; judicial resolution of the claim would almost certainly amount to unnecessary adjudication; and Regional will suffer little, if any, hardship from delay. First, it is not clear whether Legal Services actually has a fully developed policy of withholding from third parties documents relating to an ongoing investigation. It does have a policy of withholding such documents from the target of the investigation, a policy rooted in FOIA itself. See 5 U.S.C. § 552(b)(7)(A). But according to Legal Services (and Regional does not contest this claim), Regional's request for documents relating to an ongoing investigation was the first such one that Legal Services had received that was not from "a program under review." Although Legal Services did extend the policy to cover Regional's request, it is possible that, upon reconsideration in a future case, Legal Services would alter its position, especially since current Legal Services regulations on FOIA requests do not specifically cover this circumstance, see 45 C.F.R. § 1602.9, and since, as the district court noted, such an extension of the policy may conflict with our decision in Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971).

Second, because Regional has given us no reason to think that it is likely to have any cause to file another complaint with Legal Services over lobbying by recipients anytime soon, and thus no reason to think that Legal Services' alleged policy will affect it - - or, for that matter, anyone else, given that in the twenty-five years of Legal Services' existence, Regional's FOIA request is apparently the first of its kind - - adjudication of Regional's prospective claim appears unnecessary.

Third, for the same reason, any hardship that Regional may face from delaying adjudication of Legal Services' alleged policy until Regional again suffers from it will be minimal. Legal Services' policy has no "direct and immediate," Abbott Lab., 387 U.S. at 152, effect on Regional

that would amount to hardship. Indeed, the policy has no present effect at all, much less a "direct" one, "on the day-to-day business" of Regional (regardless of what effect the lobbying may have had). Id. Regional, unlike plaintiffs in cases where courts have found challenges to an agency's FOIA policies ripe, does not "rely heavily and frequently on FOIA," Better Gov't Ass'n v. Department of State, 780 F.2d 86, 93 (D.C. Cir. 1986). See Payne, 837 F.2d at 494. On the contrary, "[t]he only hardship [Regional] will endure as a result of delaying consideration of this issue is the burden of having to file another suit." Webb, 696 F.2d at 101 (finding unripe a challenge to agency's regulation governing FOIA requests). And whether that burden will ever even exist depends upon multiple contingencies - - it will arise only in the unlikely event that Legal Services' recipients (of which SCLSA is no longer one) again lobby against Regional, again do so successfully or at least in such a way as to cause difficulties for Regional, Regional again seeks to "participate" in the investigation[9] and thus brings a FOIA request, and Legal Services again delays granting the request for the same reason it did here. In light of all of these considerations, we agree with the district court that Regional's FOIA claim, in whatever form, is not justiciable, and we affirm its dismissal.

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[9] Regional's FOIA request appears actually to be a means of somehow enabling it to participate in Legal Services' internal investigation, apparently as a handmaiden of sorts to Legal Services. Regional's cause of action under FOIA included a request for an order that "in any subsequent proceedings with LSC, Regional be allowed to review all communications between the Recipients and Employees and LSC and to take discovery from the Recipients and Employees, including written inter- rogatories, requests for production of documents, and depositions." Like Legal Services, we are unaware of any authority in the LSC Act for a right to such "participation" in an investigation of others.

IV.

Accordingly, there being no basis for judicial review of Legal Services' determination that its recipients did not violate 42 U.S.C. § 2996f(a)(5) in lobbying against Regional, and Regional's FOIA claim not being ripe for review, we vacate the district court's judgment with regard to the former claim and remand with instructions to dismiss that claim, and we affirm the dismissal of the FOIA claim.

Vacated And Remanded In Part; Affirmed In Part

MURNAGHAN, Circuit Judge, concurring:

I am in agreement with the result reached in the lead opinion to the extent that it finds the actions of the Legal Services Corporation ("LSC" or "Corporation") unreviewable and Regional Management Corporation's claim under the Freedom of Information Act moot. I disagree, however, with the reasoning advanced in the opinion regarding reviewability and so write separately.

The lead opinion concludes that, because the Corporation is not subject to the Administrative Procedures Act ("APA") and because the Legal Services Corporation Act ("LSC Act") does not provide a private right of action, the Corporation's decision that certain recipients of the Corporation's funds did not unlawfully lobby the South Carolina General Assembly and the Georgia Commissioner of Insurance is not subject to judicial review. To the contrary, there exists a presumption of reviewability that can be overcome only if Congress' intent to preclude such review is "fairly discernible in the statutory scheme." Block v. Community Nutrition Institute, 467 U.S. 340, 350- 51 (1984). There is no such congressional intent evident in the case at bar. The case does involve, however, the Corporation's exercise of its discretion not to bring an enforcement action, which is beyond the power of judicial review. On that basis, the district court's decision should be vacated.

There are generally three mechanisms through which a litigant can challenge the legality of a federal agency's action: (1) the agency can be governed by the APA; (2) a particular regulatory scheme can contain an explicit provision for obtaining judicial review of agency actions under that scheme; or (3) the statute the litigant claims to be violated can provide a litigant with a private right of action to enforce the act. See Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir.), cert. denied, 119 S.Ct. 70 (1998). Since the Corporation is not "a department, agency, or instrumentality, of the Federal Government," 42 U.S.C.A. § 2996d(e)(1), its decisions are not reviewable under the APA. See Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 669 (9th Cir. 1980); Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 690, 696 (D.C. Cir. 1991). Furthermore, the LSC Act does not contain any provision for judicial review of the Corporation's decision, nor any provision that affords Regional Management Corporation ("Regional") a private right of action. The Corporation, therefore, concludes (as does the lead opinion) that Congress did not intend the Corporation's actions to be generally subject to judicial review.[1]

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[1] As support for its conclusion, the Corporation points to the legislative history of the Act. When the LSC Act was amended in 1977, the House Report stated that the amendments to the Act would reaffirm the "exclusive authority" of the Corporation to insure compliance with the Act. H. Rep. No. 95-310, 95th Cong., 1st Sess. 6 (1977), reprinted in 1977 U.S.C.C.A.N. 4503, 4504. The House Report further noted that the Act "assures that the Corporation is accountable directly and only to the Congress. That accountability mechanism has worked well and must be preserved." Id. at 4508. These quotations from the House Report, however, do not refer to judicial reviewability. As the paragraphs preceding the latter quotation make clear, and as the District of Columbia Circuit noted in Texas Rural Legal Aid, 940 F.2d 685, the "statement ... refers only to Congress's concern to `protect the Corporation from inappropriate control by the Executive Branch' .... It simply does not address the issue of judicial review of LSC action." 940 F.2d at 697 (internal citations omitted).

Contrary to the Corporation's conclusion, however, "[s]tatutory silence ... does not indicate a legislative intent to preclude judicial review." San Juan Legal Services, Inc. v. Legal Services Corp., 655 F.2d 434, 438 (1st Cir. 1981) (relying on Stark v. Wickard, 321 U.S. 288, 309-10 (1944)). As the First Circuit explained in San Juan Legal Services, "[t]here is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernible in the statutory scheme. And the preclusion of judicial review `is not lightly to be inferred.'"[2] 655 F.2d at 438 (finding nothing in the LSC Act or its legislative history suggesting that judicial review of a defunding hearing is precluded) (internal citations omitted); see also Texas Rural Legal Aid, 940 F.2d at 697 (finding "nothing in the Act or the legislative history to suggest that [Congress] meant to insulate LSC's actions from judicial review"). Indeed, absent "clear and convincing evidence"[3] of a contrary congressional intent, there is a "presumption in favor of judicial review" of administrative action.[4] Armstrong v. Bush, 924 F.2d 282, 291 (D.C. Cir. 1991) (relying on Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)); see also Electricities of North Carolina, Inc. v. Southeastern Power Administration, 774 F.2d 1262, 1266

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[2] The First Circuit in San Juan Legal Services recognized that most of the cases on which it relied "involved government agencies and were decided in the shadow of the Administrative Procedure Act." 655 F.2d at 438 n.6. The court concluded, however, that the principles were just as applicable to the situation at issue. Id.

[3] The Supreme Court in Block v. Community Nutrition Institute, 467 U.S. 340 (1984), noted that the "clear and convincing evidence" standard is not intended in the strict evidentiary sense. Rather, "the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is `fairly discernible in the statutory scheme.'" 467 U.S. at 350-51.

[4] The presumption of reviewability does not apply to an agency's discretionary refusal to initiate enforcement proceedings. See Heckler v. Chaney, 470 U.S. 821, 837-38 (1985).

(4th Cir. 1985) ("Agency actions are presumptively subject to judicial review except where Congress manifests its intent to preclude such review.") (relying on Abbott Laboratories, 387 U.S. at 140-41); Duncan v. West, 153 F.3d 719, 1998 WL 387191 (4th Cir. June 24, 1998) (unpublished) (recognizing strong presumption that Congress intends judicial review of administrative action), cert. denied, 119 S.Ct. 411 (1998). "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[5] Block, 467 U.S. at 351.

The case before us does involve, however, the Corporation's exercise of its discretion not to bring an enforcement action.[6] As such, it is a matter exclusively within the Corporation's discretion and beyond the power

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[5] The presumption of reviewability "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block, 467 U.S. at 349; see also Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-73 (1986) (noting that presumption can be defeated by "`specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is `fairly discernible' in the detail of the legislative scheme"). As stated above, no such language exists in the text of the statute, and there exists no reliable legislative history evidencing an intent by Congress to preclude judicial review.

[6] Regional maintains that the Corporation did not merely exercise its prosecutorial discretion but made an adjudicative decision, including findings of fact and conclusions of law. I do not believe that the Corporation "adjudicated" the allegations at issue. Instead, it conducted a preliminary investigation to determine if the facts alleged in the complaint warranted initiation of an adjudicative process, i.e., the defunding process. The Corporation did not hold a hearing or employ any of the procedures set forth in 45 C.F.R. Parts 1606 and 1625 for defunding proceedings because it made a decision, after the preliminary investigation, that no violation of the Act had occurred. Courts must defer to the agency's decision when the agency has conducted a preliminary "pre-adjudicatory" investigation and has decided to take no further action. See generally Sierra Club v. Larson, 882 F.2d 128 (4th Cir. 1989) ("The judiciary is ill-equipped to oversee executive enforcement decisions, whereas the agency is equipped to decide where to focus scarce resources, how to handle delicate federal-state relations and how to evaluate the strengths and weaknesses of particular cases.").

of judicial review. Congress gave the Corporation the sole authority "to insure the compliance of recipients and their employees with the provisions of the [Act] and the rules, regulations, and guidelines promulgated pursuant to [the Act] ...." 42 U.S.C.A. § 2996e(b)(1)(A). The available methods of enforcing the Act include the possible suspension of funding and/or suspension of the employees found to have violated the Act and, after proper notice and hearing, the termination of funding or the termination of the employees found to have violated the Act, "as deemed appropriate for the violation in question." 42 U.S.C.A. § 2996e(b)(5). By their terms, the statutory enforcement provisions permit, but do not compel, the Corporation to sanction violations of the Act or of the Corporation's regulations. See 42 U.S.C.A. § 2996e(b)(5); see also 45 C.F.R. § 1618.5(a) (requiring Corporation to investigate allegations of non-compliance "promptly and attempt to resolve [them] through informal consultation with the recipient"); 45 C.F.R.§ 1618.5(b) (giving Corporation discretion to suspend or terminate funding after "attempts at informal resolution have been unsuccessful"). Congress has committed the enforcement power to the Corporation's discretion, and it is therefore not within the court's power to review. [7] Chaney, 470 U.S. at 831 ("[A]n agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion.").

I, therefore, concur in the result reached in the lead opinion but believe judicial review is improper in the case at bar because the Corporation is within its prosecutorial discretion. I submit that the district court's decision should be vacated on that basis.

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[7] The presumption of unreviewability can be overcome by a showing that the statute in question provides "guidelines for the agency to follow in exercising its enforcement powers." Chaney, 470 U.S. at 833. Also, courts can "`review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations' but they `may not review agency action where the challenge is only to the decision itself.'" Electricities of North Carolina, 774 F.2d at 1267.

No. 01-534

OCT 26 2001

In the

Supreme Court of the United States

OCTOBER TERM, 2001

HUGH F. O'DONNELL AND CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INC.,

Petitioners,

v.

JOHN EIDLEMAN, JOHN ERLENBORN, AND THE LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 26, 2001

QUESTION PRESENTED

Whether a former recipient of grants from the Legal Services Corporation has an implied private right of action to challenge the Corporation's decision to change the geographical boundaries of the service areas for which it provides grants.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are named in the caption. Respondent John Erlenborn, Acting President of the Legal Services Corporation, has been substituted for John McKay, former President of the Legal Services Corporation and a defendant/appellee below, pursuant to Supreme Court Rule 35.3.

Respondent the Legal Services Corporation is a federally chartered corporation that is not a publicly held corporation or entity and does not have any parent companies.

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STATEMENT OF THE CASE

Respondent, the Legal Services Corporation ("LSC" or "the Corporation"), was created by Congress in 1974 for the purpose of "providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). By the terms of the Legal Services Corporation Act, 42 U.S.C. §§ 2996a–2996*l* (the "LSC Act"), LSC itself does not provide legal services. Instead, it provides grants to legal-services providers throughout the Nation which, in turn, provide legal services to eligible persons in the areas they serve. Pet. App. 5.[1]

LSC began in 1995 to explore the use of competitive bidding to award grants as a means of enhancing the efficacy and efficiency of the delivery of legal services that it funds. These efforts were motivated by LSC's recurring concern that it would be subject to funding cuts or limited by level funding, while still being expected to provide for the growing legal needs of low-income persons. That same year, in response to proposed legislation in Congress to require competitive bidding for the award of legal-services grants, LSC published in the Federal Register a proposed regulation to govern a competitive process for the award of grants. *See* 60 Fed. Reg. 48,951 (Sept. 21, 1995). The rule included an explanation that LSC would award grants in "service areas," the boundaries of which LSC would determine. *Id.* at 48,952. The proposed regulation also provided that LSC could change the boundaries of existing service areas, explaining that a service area "could include all or part of a current recipient's service area or be larger than an area served by a current recipient." *Id.*

In early 1996, Congress, as anticipated, passed appropriations legislation for LSC that required LSC to institute a system of competitive bidding to award grants. *See* Pub. L. No. 104-134, § 503(a)(1), 110 Stat. 1321 (1996); Pet. App. 5. That legislation also directed LSC to "define geographic areas" for

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[1] Respondent John Erlenborn is the Acting President of LSC, and has been substituted for John McKay, former LSC President and a defendant/appellee below, pursuant to Supreme Court Rule 35.3. Respondent John Eidleman is a Program Counsel for LSC with responsibility for LSC grantees in Virginia.

purposes of funding. Pub. L. No. 104-134, § 501(a)(1); Pet. App. 5. Shortly thereafter, LSC promulgated as final, with some modifications, the rules governing competitive bidding that it had proposed in 1995. *See* 61 Fed. Reg. 14,252 (Apr. 1, 1996). The preamble to these rules explained that LSC would establish service-area boundaries in its "unlimited discretion." *Id.* at 14,254. In subsequent years, the appropriations acts for LSC have restated or adopted by reference the competitive-bidding provisions of the 1996 Appropriations Act. *See* Pub. L. No. 104-208, § 502(a)(1), 110 Stat. 3009-59 (1996); Pub. L. No. 105-119, § 502(a)(1), 111 Stat. 2440, 2510 (1997); Pub L. No. 105-277, 112 Stat. 2681-107 (1998); Pub. L. No. 106-113, 113 Stat. 1501-A49 (1999).

In an effort to improve the efficiency of the delivery of legal services to the poor, LSC has since undertaken a reconsideration of its service-area boundaries, which originally had been set on the basis of historical happenstance. *See* 65 Fed. Reg. 33,842, 33,845 (May 25, 2000) (noting that "the present delivery structure reflects national funding decisions made in the late 1970's"); Pet. App. 6. In many states, LSC has decided to consolidate service areas in order to improve the delivery of legal services. This consolidation has resulted in a decrease in the total number of service areas.

In 1998, LSC requested that LSC grant recipients consider additional ways to improve the delivery of legal services in their states. LSC issued Program Letters 98-1 and 98-6 in February and July 1998, respectively. Pet. App. 6. Those letters posed to LSC grant recipients a variety of questions to which LSC sought responses.

After initial discussions among Virginia grant recipients undertaken pursuant to these Program Letters, LSC requested that the grantees consider a number of the issues that they had thus far failed to address. *See* Pet. App. 6. In particular, LSC requested that grant recipients "develop a plan that has the potential of creating the optimal legal services delivery system" for Virginia. To this end, LSC requested that Virginia grant recipients consider configurations for Virginia that had between four and six service areas, instead of the then-current twelve service areas. The programs were asked to advise LSC as to the optimal configuration of service areas in Virginia to assist LSC in arriving at a decision on the new configuration. *Id.*

The grant recipients ultimately submitted to LSC a report in which the programs proposed reducing the number of service areas in Virginia from twelve to six or seven. *See* Pet. App. 6. LSC adopted the seven-area proposal for the boundaries of the service areas in Virginia, and LSC announced its decision in the Request for Proposal that it made available in April 2000 for grants for 2001. Pet. App. 6; *see* 65 Fed. Reg. 21,480 (Apr. 21, 2000) (publishing list of service areas for, *inter alia*, Virginia)

Petitioners, Client Centered Legal Services ("CCLS") and Hugh O'Donnell, filed a lawsuit challenging LSC's decision to change the service-area boundaries, alleging that the decision violated Congress's competitive-bidding statute, was *ultra vires*, and was in other respects not in accordance with law. The district court ruled that LSC was within its authority to change the service-area boundaries. Pet. App. 8. The court rejected the other claims advanced by Petitioners. *Id.* Accordingly, the court denied all relief requested by Petitioners and entered judgment on the merits for Respondents.

The court of appeals affirmed on the ground that LSC grantees have no private right of action to challenge LSC's decision to change the boundaries of service areas. Pet. App. 4. The Court of Appeals based its ruling on its prior holding in *Regional Management Corp.* v. *Legal Services Corp.*, 186 F.3d 457 (4th Cir. 1999) (Pet. App. 12), which held that a company against whom an LSC grantee lobbied—allegedly in violation of applicable regulations—had no private right of action to challenge LSC's decision not to discipline the grantee.

REASONS FOR DENYING THE WRIT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the decision below is squarely in line with this Court's holding last term in *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001), which reaffirmed the standards this Court applies to determine whether a party has an implied private right of action. Despite the established precedent of this Court upon which the court of appeals relied in this case and in *Regional Management*, Petitioners attempt to manufacture a split in the circuits by citing to older decisions by other courts of appeals that were distinguished by the Fourth Circuit and decided before many of this Court's decisions regarding private rights of action. Moreover, Petitioners'

claims on the merits were properly rejected by the district court. Accordingly, there is no reason for this Court to grant the writ.

I. The Court Of Appeals Correctly Held That Petitioners Have No Implied Private Right Of Action

Petitioners have no private right of action to challenge LSC's decision to change the boundaries of the service areas for which it provides grants. This Court has held repeatedly that "private rights of action to enforce federal law must be created by Congress." *Alexander*, 121 S. Ct. at 1519 (citing *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)). Where Congress has not created such a right of action, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 1520 (citations omitted). Therefore, whether to imply a private right of action "must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1102 (1991) (citing *Touche Ross*, 442 U.S. at 575). It is clear from both the LSC Act and its legislative history that Congress did not intend to give LSC grantees a private right of action to challenge the type of decision at issue in this case.

There is no explicit provision for judicial review in the LSC Act. Nothing in the Act directly confers upon anyone the right to challenge LSC's decisions. Indeed, LSC is expressly exempted from the provisions of the Administrative Procedure Act ("APA"). *See* 42 U.S.C. § 2996d(e)(1) (LSC is not "a department, agency, or instrumentality, of the Federal Government"); *Texas Rural Legal Aid, Inc.* v. *Legal Services Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991); *Multnomah Legal Services Workers Union* v. *Legal Services Corp.*, 936 F.2d 1547, 1556 (9th Cir. 1991) (citing *Spokane County Legal Services* v. *Legal Services Corp.*, 614 F.2d 662 (9th Cir. 1980)).[2] LSC is thus not subject to the restrictions of the APA, nor do the judicial-review provisions of the APA apply to LSC's actions. *See Regional Management*, 186 F.3d at 463 ("[W]e find no reason to suppose that Congress, while exempting [LSC] from judicial review under the APA . . . , intended to grant a right of action to parties such as [Petitioner].").

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[2] The LSC Act contains limited exceptions to this provision that are not relevant here. *See* 42 U.S.C. § 2996d(g) (LSC subject to FOIA).

The legislative history of the LSC Act's confirms that Congress considered and rejected a private right of action that would allow suits against LSC. *See generally Grassley* v. *Legal Services Corp.*, 535 F. Supp. 818, 823 (S.D. Iowa 1982) (discussing legislative history). The bill as introduced contained a citizen-suit provision. *See* H.R. 7824, § 6(c)(6) (1973).[3] The provision was removed in committee, *see* H.R. Rep. 93-247, at 27 (1973) (minority views of Rep. Landgrebe), but efforts were made to restore the provision by amendment when the bill reached the floor. *See* 119 Cong. Rec. 20,725 (1973); *see also id.* at 20,704 (support of amendment by Rep. Rousselot). The debate on the proposed amendment reflected congressional concern that the provision would impose unacceptable costs on the Corporation. *See id.* at 20,725 (Rep. Clay) ("[I]f we keep adding similar amendments we are going to break the Corporation we are talking about."); *id.* (Rep. Meeds) ("[T]his [amendment] gives any [litigant] . . . the standing to sue this Corporation."). The amendment was rejected on a roll-call vote. *Id.* at 20,728–29.

Finally, Petitioners are not within the class of persons for whose "especial benefit" the statute was enacted. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Neither Petitioner CCLS, a provider of legal services, nor Petitioner O'Donnell, the Executive Director of CCLS, is an indigent person. *See* 42 U.S.C. § 2996b(a) (LSC was created to "provid[e] financial support for legal assistance . . . to persons financially unable to afford legal assistance"). Therefore, the court of appeals correctly held that no private right of action should be implied. *See* Pet. App. 4 ("Although legal services programs such as CCLS are an integral part of the process of delivering [legal] services, the programs themselves are not the beneficiaries of the Act.").[4]

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[3] The proposed citizen-suit provision read as follows:

> Any interested person may bring an action in a Federal district court to enforce compliance with the prohibitions of or under this Act by the Corporation or any recipient or any officer or employee of the Corporation or of any recipient.

[4] Petitioners have no right to future funding from LSC. *See* Pub. L. No. 104-134, § 503(e) (precluding preferential treatment of incumbent grantees); 45 C.F.R. § 1634.9(b) (2000) (same); *see also Legal Services* (*continued . . .*)

The court of appeals, applying this Court's precedents, correctly held that Petitioners have no private right of action to challenge LSC's decision to reconfigure the boundaries of the service areas for which LSC awards grants.

II. The Ruling Below Is Not In Conflict With Decisions Of Other Courts Of Appeals

The three cases that Petitioners contend conflict with the decision of the court of appeals do not, in fact, conflict with that decision and are readily distinguishable, as explained by the court of appeals. Even if there were a conflict, moreover, it would be questionable whether decisions handed down one or two decades ago remain good law in the light of this Court's more recent decisions.

As an initial matter, none of the cases cited by Petitioners even addressed whether the plaintiff had a private right of action. Indeed, not one of these cases cites *Cort* or any other private-right-of-action case. Rather, the cited cases concluded that the court could review LSC's actions based on the presumption that "agency" actions are subject to judicial review. *See Texas Rural Legal Aid*, 940 F.2d at 697; *San Juan Legal Services, Inc.* v. *Legal Services Corp.*, 655 F.2d 434, 438 (1st Cir. 1981); *see also Spokane County Legal Services*, 614 F.2d at 667 (addressing only subject-matter jurisdiction). That presumption is not applicable, however, because of the LSC Act's express provision that LSC is not an "agency" subject to the APA. As explained in Section I, *supra*, the court of appeals correctly analyzed the question by inquiring as to whether Congress had created a cause of action against LSC, not whether it had exempted LSC from the APA (which is not disputed). None of the cases Petitioners cite appears to have considered the argument that the plaintiff had no private right of action; as a result, none of those decisions conflicts directly with the holding of the court of appeals.[5]

(. . . *continued*)
Corp. of Prince George's County, Md. v. *Ehrlich*, 457 F. Supp. 1058, 1064 (D. Md. 1978) (no right to funding).

[5] The existence of a private right of action is not jurisdictional. *See Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 (*continued* . . .)

The cases cited by Petitioners are also readily distinguishable from this one. Two of the cases cited—*San Juan Legal Services* and *Spokane County Legal Services*—arose under a different part of the LSC Act that contains a procedural limitation on the early termination of LSC funding to a grantee. *See* 42 U.S.C. § 2996j(2) ("financial assistance . . . shall not be terminated" without a hearing by an "independent hearing examiner"). In *San Juan Legal Services*, the court held that it was appropriate to conclude that Congress had assumed "judicial review would be available to a grantee who claimed that it was denied such a hearing." 655 F.2d at 439. Similarly, in *Spokane County Legal Services* a court held that it had jurisdiction to consider the alleged procedural shortcomings of the hearing provided to a grantee that had been defunded. 614 F.2d at 665.

Because these cases were premised upon a cause of action arising from hearing rights, the court of appeals correctly distinguished them. Pet. App. 4 n.* (citing *Regional Management*, 186 F.3d at 464). No hearing is required, and no procedural rights are provided in the statute or regulations regarding LSC's service-area boundary decisions. *See Regional Management*, 186 F.3d at 464 (noting that defunding cases involved challenges to LSC actions that are to be taken pursuant to APA-like requirements). In fact, the competitive-bidding statute expressly provides that the restrictions on defunding in Section 2996j do not apply. Pub. L. No. 104-134, § 503(f).[6] This makes clear that LSC's service-area-boundary decisions do not come within the possible applicability of the earlier cases.

Texas Rural Legal Aid is also distinguishable, because it involved a challenge to an LSC regulation that placed direct limits on the expenditures of LSC funds by grantees. *See* 940 F.2d at 687. Here, in contrast, LSC's decision to reconfigure service-area boundaries did not place any direct limitations on grantee

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(. . . *continued*)
U.S. 517, 523 n.3 (1991). Accordingly, these courts cannot be deemed implicitly to have considered the question.

[6] Petitioners did not invoke *any* specific statute in their complaint, alleging only that the court's jurisdiction arose under the federal-question statute, 28 U.S.C. § 1331, and commerce-and-trade statute, 28 U.S.C. § 1337.

expenditures or otherwise regulate their conduct. Instead, LSC altered the boundaries of the areas for which it would award grants in an effort to improve the delivery of legal services to low-income persons. In so doing, LSC did not alter any rights of grantees.

Moreover, two of the cases relied on by Petitioners were decided in the early 1980s, and the third was decided in the early 1990s, before this Court's decisions limiting the availability of implied private rights of action. This Court continued to apply *Cort* until at least five years after *San Juan Legal Services* and *Spokane County Legal Services*. *See, e.g., Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 810–11 (1986). Under *Cort*, the hearing rights provided by the LSC Act were for the benefit of the defunded grantee, and thus might implicitly create a private right of action. Similarly, *Texas Rural Legal Aid* was decided before this Court's most recent decisions regarding private rights of action, which have further narrowed *Cort*. *See, e.g., Alexander, supra*. This Court's intervening jurisprudence has called into question the continuing validity of the decisions cited by Petitioners, which have not been reaffirmed by the courts of appeals that issued them.

III. The LSC Decision Petitioners Have Challenged Is Correct And Is Not Before This Court

Petitioners also contend that LSC's decision to reconfigure service areas failed to adhere to the statutory requirement that LSC award grants through a system of competitive bidding. The court of appeals did not reach this issue, on which there is no circuit conflict. Moreover, the district court correctly held that LSC's decision created competition and was lawful, rational, and supported by evidence.

The relevant legislation expressly directs LSC to "define geographic areas" for purposes of funding. Pub. L. No. 104-134, § 501(a)(1). The preamble to the grant competition regulations published in the Federal Register explained that a "'service area' . . . could include all or part of a current recipient's service area *or be larger than an area served by a current recipient*." 61 Fed. Reg. at 14,254 (emphasis added). It is thus clear that LSC has broad authority to enlarge the boundaries of service areas "to respond to a

reduced budget and to make grants to applicants who submit creative solutions to such fiscal realities." *Id.*[7]

LSC's decision to consolidate service areas in Virginia has had the salutary effect of creating competition. Prior to the grant competition for 2001, the Petitioner, CCLS, never faced competition for its service area during the era of competitive bidding; and there had been no competition for the grants in other service areas in Virginia. Grant year 2001 was the first year in which two applicants applied for a single grant in a Virginia service area—the new service area created by the consolidation of areas in southwestern Virginia, including the area served by CCLS. *See* 65 Fed. Reg. 58,570, 58,574 (Sept. 29, 2000) (noting two applicants for grant for VA-15, the southwest Virginia service area).

The district court correctly held that LSC's decision to create seven service areas in Virginia was rational and supported by evidence. *See* Pet. App. 8. As LSC explained at trial, the consolidation of service areas can enhance program effectiveness and efficiency. LSC also presented other evidence of the benefits that consolidation of service areas brings.

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[7] Petitioners' reliance upon *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is misplaced. That decision addressed the claimed authority of the Food and Drug Administration ("FDA") to regulate tobacco products. This Court held that because Congress has long legislated based upon the FDA's acceptance of the proposition that it lacked the authority to regulate cigarettes, Congress' intent not to delegate that authority to FDA was clear, and the FDA could not infer its authority from an ambiguous statute. *Id.* at 156. Here, Congress explicitly directed LSC to implement a system of competitive bidding and define service areas, and clearly delegated the necessary authority to LSC. Congress has ratified this authority by passing annual appropriations acts for LSC with awareness of the competitive-bidding regulations, which include the authority to change service-area boundaries.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

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October 26, 2001

CONCLUSION

If Defendants' Petition for a Writ of Certiorari is granted, this conditional Cross-Petition should likewise be granted.

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No. 01-534

Supreme Court, U.S.
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In The
Supreme Court of the United States

HUGH F. O'DONNELL
and
CLIENT CENTERED LEGAL SERVICES
OF SOUTHWEST VIRGINIA, INCORPORATED,

Petitioners,

v.

JOHN EIDLEMAN, JOHN MCKAY
and
LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners have filed a Petition for Writ of Certiorari. On October 26, 2001, Respondents filed a Brief in Opposition. This Brief replies to that effort.

ARGUMENT

I. Respondents' Brief in Opposition is Factually Inaccurate

In their Brief at p.i , Respondents describe the question presented as whether a "former recipient" of grants from the Legal Services Corporation has an implied right of action "to challenge the Corporation's decision to change the geographical boundaries of the service areas for which it provides grants." This description is erroneous.

First, when Petitioner CCLS brought this action in February 2000, it was not a **former** recipient of LSC funding but a **current** recipient trying to maintain quality and level of services by adjusting to the competitive regime which Congress had required when it enacted the 1996 Appropriations Act. *See* Pub.L.104-208, 110 Stat. 3009 (1996). As its guide for surviving in the new competitive environment, CCLS had the mistaken belief that the regulations which the LSC Board had promulgated after notice and comment ought to trump the desires of LSC managers for fewer and bigger programs. See 45 C.F.R 1634. Because it saw a conflict between what the regulations said publicly and what LSC bureaucrats were doing covertly, there was no choice but to seek judicial guidance.

Second, although CCLS did challenge the decision of LSC bureaucrats to summarily abandon the "service areas" which had been defined and used for three rounds of competition in favor of a new "service area" equal in area to New Jersey, its challenge was broader. Besides challenging the new "service area" which LSC created in Southwest Virginia, CCLS also challenged the decisions of the LSC

president to arbitrarily shorten the term of the CCLS grant for the sole purpose of insuring that the new service area could be imposed sooner than later. Petitioner O'Donnell also specifically challenged the LSC requirement of a "statewide perspective" as inconsistent with his own fiduciary duty of service to the people of the coalfields.

Besides wrongly narrowing the scope of the CCLS challenge and the program's status as a current recipient at the time of the challenge, Respondents' brief also misstates the history of this case. The Brief states at p. 3 that the court of appeals "affirmed" and cites Pet. App. 4 as evidence of that affirmance. Turning to the reference cited, one finds that the court of appeals did not affirm the decision of the trial court but instead vacated the earlier decision and remanded it with instructions.

Although the fact is absent from Respondents' brief, the lower court's decision conflicts with the trial court on the central issue of whether judicial scrutiny ought to be available for LSC grantees directly and significantly affected by LSC conduct. In its bench decision, the trial court reached the merits of the case by specifically concluding that the decision of the Fourth Circuit in *Regional Management Corporation, Inc. v. Legal Services Corporation*, 186 F3d 457 (1999) could be distinguished because the plaintiff in that case was not an LSC grantee. Pet. App. 8. In reaching its decision, the trial court also noted that "defendants do not contend that all judicial review is barred." Pet. App. 8.

In asserting their current position barring judicial review of LSC decisions directly affecting the funding of grantees, Respondents obviously minimize the anomalous aspects of the lower court decision. Not only did the lower court overrule the trial court, there are at least three circuit court decisions reaching the conclusion that LSC decisions affecting grantees are subject to judicial review. Respondents claim that none of those decisions conflict with the decision here. Their effort to paper over these conflicts, though strenuous, is simply not persuasive.

For example, Respondents claim *Texas Rural Legal Aid v. Legal Services Corp.* 940 F.2d Corp. (D.C. Cir. 1991) is not in conflict. According to Respondents' Brief at p. 7, that case may be distinguished from the case here because it placed "direct limits on the expenditures of LSC funds by grantees. Here, in contrast, LSC's decision to reconfigure service-area boundaries did not place any direct limitations on grantee expenditures or otherwise regulate their conduct."

The distinction makes no sense. As noted earlier, Petitioners challenged not only the sudden creation of a new service area the size of New Jersey, but also the arbitrary shortening of the grant term from three years to one year. To suggest that the two decisions had no "direct" consequences on CCLS operations is clearly erroneous. As a result of the arbitrary shortening of the grant term, CCLS was forced into another round of "competition" two years sooner than would have otherwise occurred. As a result of the re-definition of a service area which was composed of three former service areas, the competitive posture of CCLS was also radically altered. The effect of that alteration was to devalue the program's experience delivering services in the coalfields. The ultimate impact of the alleged "competition" was in fact far more severe on CCLS than the impact of the regulation considered in *Texas Rural* since it forced CCLS to change its very identity as a coalfield entity, grounded in coalfield experience.

As Judge Murnaghan noted in his concurring opinion in *Regional Management, Texas Rural* clearly held at 697 that was "nothing in the Act or the Act or legislative history to suggest that Congress meant to insulate LSC's actions from judicial review." Pet. App 30. To the extent that the case at bar finds that the same legislative history and Act insulate LSC conduct toward its grantees from judicial review, there is plainly a conflict between the two cases. Because there is a conflict among the circuits on this important question, this court should act to resolve it by granting the writ.

II. Respondents' Claim Concerning the Impact of LSC Actions On Competition Does Not Withstand Scrutiny

In its bench opinion, the trial court found that LSC had something which the court called "a merger program" and that it was clear that this "is an official policy of the Corporation directed by its chief executive officer." Pet. App. 9 The court also stated that "the plaintiffs contend that the Board of Directors of LSC has not approved this merger program, **but there is no evidence that this policy requires approval of the Board of Directors."** Pet. App. 9

On appeal, Petitioners challenged the trial court's conclusion that the legal question of whether LSC's "merger program" was authorized by statute and regulations was a matter of "evidence." They contended that any evaluation of the legality of "the merger program" has to consider the total statutory and regulatory context including the 1996 Appropriations Act, and that the issue is purely a legal question. Petitioners also contended that the failure of the LSC Board of Directors to use its regulatory power to authorize the "merger program" is problematic.

As previously noted, Section 503 of the 1996 Appropriations Act not only required a system for the competitive award of grants but also required the Corporation to promulgate "regulations" to implement it. Although the LSC Board did in fact respond to statutory directive by promulgating regulations establishing a system for the competitive award of grants at 45 CFR 1634, the "merger program" pushed with fanatic vigor by LSC managers directly opposed the competitive thrust of the appropriations law and implementing regulations. Although Congress obviously intended that "regulations" establishing a competitive regime would be the principal vehicle for shaping and improving legal services, management's "merger program" substituted an alternative vision—one not grounded in regulations . A plain example of this conflict may be found by considering the provisions

of 45 C.F.R. 1 (d) which states that one of the five purposes of such a competitive system is to "Preserve local control over resource allocation and program priorities." It is blatantly obvious that combining three "service areas" into a new service area the size of New Jersey has absolutely nothing to do with preserving "local control" since under the new configuration the power and influence of each locality will be diluted.

In their Brief in Opposition, Respondents admit the "merger program" has "resulted in a decrease in the total number of services areas". Respondents' Brief 2. The irony of this consequence should be noted. Using tools relating to the definition of "service area" and duration of grant term which were supposed to be part of promoting competition and preserving local control, the LSC president has in fact caused a significant reduction in the number of competitive opportunities. He has done so without the benefit of a single Board resolution supporting or directing his conclusion that consolidation not competition was the way to improve the legal services delivery system.

The central question here is whether a program intended by Congress to insert "competition" into the provision of civil legal services can be reconciled with a program which both drastically reduces the number of competitive opportunities and greatly diminishes the possibility of local control of resources. The trial court failed to address this question by any reference to the 1996 Appropriations Law; and the lower court avoids it altogether by insulating the "merger program" from any judicial review.

Is competition aided by a holding which insures that those who are the victims of LSC 's "merger program" lack any recourse to point out the plain conflict between what Congress said and what LSC did ? Although Petitioners appreciate how advocates of "unlimited discretion" might well want to avoid any independent examination of LSC decision-making, upholding the result reached by the lower

court would be a devastating blow for those principles of transparency and predictability which are fundamental to a competitive regime.

Finally, in defense of their claims for "unlimited discretion", Respondents' brief identifies two issues which are worthy of scrutiny. The first is the report which was "ultimately submitted" to LSC and which "proposed reducing" the number of service areas from twelve to six or seven. Respondents Brief.3 Although Respondents would have this court believe that the report was a thoughtful examination of how legal services in Virginia should be re-structured, the truth is less pretty. The "proposal" was the hurried response to instructions by Respondent Eidleman concerning the demands of the LSC president for fewer Virginia programs. Although LSC guidelines called for a broad-based planning process, the proposal emanated from legal services programs who were receiving funds from LSC. There was no involvement in the report by the judiciary, local bar associations or other groups interested in the welfare of low income people. Although the trial court found that "whether there were sufficient stakeholders involved is not legally relevant" Pet. App. 9, the narrow range of authorship is a good index of the proposal's lack of authenticity and the high level of intimidation involved in its creation. Under presidential threat of a single statewide program, programs did what they were told and produced a report which could be used by LSC to justify its action.

The other issue appears on p. 9 of Respondents' Brief. This is the claim that LSC's decision to consolidate service areas "had the salutary effect of creating competition." The reference here is to the fact that shortly before the trial of the case, the executive director of the Southwest Virginia Legal Aid Society, Larry Harley, announced that Southwest was going to "compete" against CCLS and the New River program for the new service area. As a consequence of this conveniently timed announcement which occurred weeks before the deadline for proposals, at

trial LSC claimed that there was nothing "anti-competitive" about what LSC was doing since there was now "competition" in Southwest Virginia for the first time. Looking beyond the competitive facade of this claim reveals a village only Potemkin could love. First, Harley's pre-trial announcement of his intent to compete does not change the reduction in the number of competitive opportunities nor the diminution of local control. Instead of three chances for a new entity to seek a grant for delivery of legal services in Southwest Virginia, there was now only one. Moreover, the enormous size and heterogeneous nature of the new service area present a more significant challenge for any possible new competitor. Second, although unmentioned in Respondents' Brief, the relationship between Harley and LSC managers at the time of the announcement and thereafter was something other than the arms'-length course of dealing which might be expected in a genuine competition. The week before trial, Respondent Eidleman testified at a deposition that he had not provided any advice at all to Harley concerning the competition with CCLS and the New River program. In admissions received by Petitioners the weekend before the Monday trial, LSC admitted that contrary to Eidleman's testimony, both he and Bob Gross, the LSC official in charge of state planning, had provided advice to Harley. Although Respondents claim that the "competition" in Southwest Virginia was "created" by the LSC decision to consolidate three areas into one, the decision which created the competition was in fact the Harley decision. Given LSC's advisory relationship with the Southwest director and LSC's litigational interests in showing the trial court how consolidation of service areas was really "competitive", the LSC claim that consolidation" created "competition" is dubious. Harley's decision to help out his "advisors" by giving them an argument they could use does not change the fundamentally anti-competitive nature of LSC's "merger program."

CONCLUSION

For the reasons previously stated, this court should grant the writ of certiorari. The decision of the Fourth Circuit is inconsistent with the decisions of all other circuits which have considered the issue of whether LSC's conduct toward its grantees should be insulated from judicial review. The LSC "merger program" is in fundamental conflict with the statutory and regulatory scheme which Congress mandated. Because this case is the only extant legal challenge to that "merger program", it presents a unique opportunity to re-establish the principle that statutes should not be undermined by bureaucratic fiat.

Respectfully Submitted,

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